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In the

Supreme Court of the United States.

October Term, 1930.

No. 42.

UNITED STATES OF AMERICA, Petitioner,

v.

BOSTON BUICK COMPANY, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 19-23) is reported in 35 F. (2d) 560.

The opinion of the District Court for the District of Massachusetts (R. 14-16) is reported in 27 F. (2d) 395.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered on November 5, 1929 (R. 19-23).

The jurisdiction of this court rests upon the provisions of section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit was filed by the petitioner on February 5, 1930, and was granted by this court on March 17, 1930 (R. 24).

STATEMENT OF THE CASE.

This is an action to recover interest upon an overpayment of taxes applied as a credit against taxes due for other years.

In December, 1923, respondent made application for special assessment of its 1918 excess-profits tax; on February 26, 1924, the Commissioner allowed said application and determined the correct tax liability of respondent to be $23,181.08 less than the amount originally assessed (R. 5). On March 14, 1924, this overassessment was listed by the Commissioner upon a schedule of overassessments (Ex. A, R. 6-7) and forwarded to the Collector at Boston (R. 5). This schedule directed the Collector to examine the taxpayer's account and determine whether the amount of such overassessment should be abated, and, if any part of the overassessment was found to be an *overpayment*, to examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, for such other periods; the Collector was also directed to enter in the appropriate columns of the schedule the amount of such credits and the refundable balance, if any, and to certify such schedule and another schedule of refunds and credits (Ex. B, R. 8-9), upon

which similar entries were to be made, and return copies of each to the Commissioner.

On April 15, 1924, the respondent filed with the Commissioner a claim for credit of $15,903.99 against a tax instalment due on that date, and for the refund of $7,277.09, being the balance of said overassessment, and, on July 3, 1924, filed a claim for credit of $7,277.09, theretofore claimed as a refund, against an instalment of tax due on July 15, 1924 (R. 5).

On July 11, 1924, the Collector acted upon said schedules, determined the entire amount of the overassessment to be an overpayment, certified and returned both schedules to the Commissioner, and entered upon his books a credit of $7,277.09 against outstanding taxes for the year 1919 and a credit of $15,903.99 against a tax instalment due on April 15, 1924; thereafter, on November 11, 1924, the credit of $7,277.09 was taken away from respondent's account for the year 1919 and applied as a credit against an instalment of tax due on July 15, 1924 (R. 5).

On July 31, 1924, the Deputy Commissioner certified to the Commissioner with reference to the refundable portions of the overassessments appearing on the Schedule of Refunds and Credits, and accrued interest, if any, and the Commissioner authorized the Disbursing Clerk to pay the same (Ex. B, R. 8).*

*Although the Schedule of Refunds and Credits as printed at page 8 of the record does not disclose the signatures of the Commissioner and Deputy Commissioner, it is agreed that the certificates appearing upon this schedule were, in fact, signed by these officials.

QUESTION PRESENTED.

The sole question presented is—

Whether interest on the credits should be computed under section 1324 (a) of the Revenue Act of 1921 or under section 1019 of the Revenue Act of 1924, which question depends, in turn, upon whether the credits were "allowed" before or after June 2, 1924, the effective date of the Revenue Act of 1924.

STATUTES INVOLVED.

Revenue Act of 1921.

"Sec. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1917 or the Revenue Act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer."

"Sec. 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from

the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. * * *"

Revenue Act of 1924.

"Sec. 281 (a). Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, * * * the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

"Sec. 1019. Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, * * *"

SUMMARY OF ARGUMENT.

1. The allowance of a credit does not take place when the Commissioner signs the Schedule of Overassessment for transmission to the Collector. *Girard Trust Co.* v. *United States*, 270 U.S. 163.

   (*a*) At that time the amount of the credit has not been determined nor has it been determined that

the overassessment will result in any credit whatever.

(*b*) The Commissioner has no authority to allow a credit prior to a determination that there had been an overpayment which cannot be ascertained until he has received back the Collector's report.

(*c*) The date of allowance of the credits in this case could not have been March 14, 1924, the date when the Commissioner first signed the Schedule of Overassessments, inasmuch as the instalments against which the overpayment was later credited were not then due.

2. The allowance of the credit took place on July 31, 1924, when the Commissioner approved the Schedule of Refunds and Credits.

(*a*) This construction creates no administrative difficulties.

(*b*) Contrary departmental construction should not control the plain meaning of the law.

3. Significance of July 11, 1924, the date when the Collector acted upon the schedule.

ARGUMENT.

It has been decided by this court in the cases of *Blair* v. *United States, ex rel. Birkenstock et al.*, 271 U.S. 348, *and United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, that the law in force at the time of the *allowance* of a refund governed the amount of interest payable. The same rule would obviously hold true in the case of a credit.

1. The allowance of a credit does not take place when the Commissioner signs the Schedule of Overassessments for transmission to the Collector.

The first case involving the question as to when the date of "allowance" occurred was *Girard Trust Co.* v. *United States*, 270 U.S. 163. In that case the Government contended, as it does here, that the date of allowance was the date when the Commissioner first signed the Schedule of Overassessments forwarded to the Collector. The Regulations at that time provided as follows:

> "A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund."

This court overruled the Government's contention and decided that this regulation was invalid. In its opinion this court said (pp. 170, 171):

> "We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue who made the collection and keeps the account with the taxpayer. The findings and the exhibits show that the course of business is that the collector, on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the Bureau the

*amount which should be credited** on taxes and the *amount to be refunded;* that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, *who makes it effective by his approval.* Until it reaches him and is approved by him, the refund can not be paid. This, we think, is the real date of allowance. *Until that time the exact amount of the refund is not fixed finally by competent authority.* This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and *it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government.*" (Italics supplied.)

Again (p. 170): "The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund *or credit* should be granted and when he has made that decision finally, he has allowed the claim for the refund *or credit* of the taxes paid within the meaning of the Section." (Italics supplied.)

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*The Government argues that this is an incorrect statement by the court and refers to the Collector's certificate on the Schedule of Overassessments. This argument entirely ignores the Certificate of Collector appearing on Schedule of Refunds and Credits (R. 8), which states that "An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability *subject* to refund or credit." (Italics supplied.)

The form of the Schedule of Overassessments in the instant case is substantially the same as that before this court in the *Girard Trust Company* case, and is identical with the one involved in *Blair* v. *United States, ex rel. Birkenstock,* in which the *Girard Trust Company* case was followed.

(a) At the time the Commissioner signed the Schedule of Overassessments, the amount of the credit had not been determined, nor had it been determined that the overassessment would result in any credit whatever

There is no doubt that when the Commissioner signed the Schedule of Overassessments on May 14, 1924, it constituted his decision that an *overassessment* had been made. It is also equally clear that at that time the Commissioner did not decide that either a *refund* or *credit* should be granted. In both these respects the facts in the *Girard Trust Company* case and in the instant case are identical.

It is plain from the instructions of the Commissioner to the Collector appearing on the Schedule of Overassessments (Ex. A, R. 6) that the Commissioner did not know at the time he signed such schedule whether the overassessment would result in either a refund or a credit. It will be noted that the instructions to the Collector required him first to check the *overassessment* against the account of the taxpayer and determine whether there had been an *overpayment.* The instructions then provided as follows:

> "*If any part of any such item is found to be an overpayment,* you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, mak-

ing the appropriate entries in your accounts. Such credits will be entered in Column 9, and placed in Column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

"The balance, if any, of the overpayment will be entered in Column 12, and placed in Column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's accounts.

"You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue." (Italics supplied.)

An item appearing in the Schedule of Overassessments might result in a refund or in a credit, or might not result in either. If a particular item is later found to result in a refund, it is settled by the *Girard Trust Company* case that allowance of the same was not made on March 14, when the Commissioner signed the Schedule of Overassessments, and, if the position of the Government is correct, the question of whether a particular item appearing therein is "allowed" when the Commissioner signs the schedule cannot be determined at that time, but must await the ultimate finding by another official of certain facts not then known to the Commissioner and which would not, in the normal course of events, be ascertained for several months thereafter. This is clearly open to the same objections stated by the court in *Girard Trust Company* case that "the exact amount of the refund is not fixed finally by competent authority" and that it is not "in conformity to the general purpose of Congress to re-

lieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government."

(b) The Commissioner had no authority to allow a credit prior to a determination that there had been an overpayment, which could not be ascertained until he had received back the Collector's report.

The attention of the court is directed to the fact that under both section 252 of the Revenue Act of 1921 and section 281 of the Revenue Act of 1924 the allowance of credits and refunds is limited to cases where there have been *overpayments*. Authority was first given to the Commissioner to allow an overpayment of taxes for one year to be credited on taxes due for other years by section 252 of the Revenue Act of 1918. That section was re-enacted verbatim in section 252 of the Revenue Act of 1921 and without material change in section 281 of the Revenue Act of 1924. The authority granted by the 1918 and 1921 Acts was in cases where "it appears that an amount of income, war-profits or excess profits tax has been paid in excess of that properly due," and by the 1924 Act in cases where "there has been an overpayment of any income, war-profits or excess profits tax." The allowance of a credit, therefore, under these Acts necessarily involved a determination that there had in fact been an overpayment. That fact had not been determined when the Commissioner signed the Schedule of Overassessments for transmission to the Collector. He had no knowledge of the same until he received back the report of the Collector, and it is submitted that until that time neither a refund nor a credit could have been allowed by him.

(c) The date of allowance of the credits here could not have been March 14, 1924, the date when the Commissioner signed the Schedule of Overassessments, as the instalments against which the overpayment was credited were not then due.

The sections of the law above referred to further required that the amount of such overpayment "shall be credited against any income, war-profits, or excess profits tax, or instalment thereof, then due from the taxpayer, and any balance of such excess shall be immediately refunded to the taxpayer." The inclusion of the phrase "or instalment thereof" and the qualification of "due" by the word "then" plainly indicates that the word "due" was used in this section as meaning *due and payable*, as distinguished from due and owing.

It will be noted that, in this case, if the date of allowance was March 14, 1924, when the Commissioner first signed the Schedule of Overassessments for transmission to the Collector, the instalments of tax against which the overpayment was credited were not then due. The facts are (R. 5) that on April 15, 1924, respondent filed a claim asking that the overassessment of $23,181.08 be applied as a credit in the amount of $15,903.99 against an instalment due on that date and that the balance of $7,277.09 be refunded; and on July 3, 1924, filed a claim for credit of $7,277.09, theretofore claimed as a refund, against an instalment due on July 15, 1924. The Collector, on July 11, 1924, entered upon his books the credit of $15,903.99 against the April 15, 1924, instalment and applied the balance of $7,277.09 as a credit against 1919 taxes then outstanding; thereafter the credit of $7,277.09 was taken away by the Collector from

the respondent's account for 1919 and applied as a credit against an instalment due on July 15, 1924.

It will not be questioned that it has been the uniform practice of the Government to apply overpayments as credits against taxes or instalments due at the time of the Collector's action upon the schedules, even though such taxes or instalments, as here, were not due at the time the Commissioner first signed the schedule. But the position taken by the Government in this case is clearly inconsistent with this practice. If the allowance of a credit takes place when the Commissioner first signs the schedule, no credit can be allowed against taxes or instalments not then due, and the overpayment must "be refunded immediately to the taxpayer," in accordance with the express requirement of the statute.

Such a construction would not only add to the difficulties of the Government bookkeeping and accounting and overturn long-continued departmental procedure, but would also result in a situation plainly prejudicial to the interests of the Government.

A much more reasonable interpretation is the one adopted by the court below, namely, that the allowance of a credit does not take place until the Commissioner has received the necessary information from the Collector as to the state of the taxpayer's account and is thus in a position to finally determine *the exact amount of the refund or credit*. As was stated by the court below (R. 22):

> "It would be a strained construction of the Commissioner's directions to the Collector to hold that he thereby allowed and approved something of which he had no knowledge and could have none

until a report was received back from the Collector."

The Government's brief points out that the statute relating to interest refers in the same sentence to the allowance of both credits and refunds and argues that the same construction should be given to the word "allowance" in each case. With this the respondent is entirely in accord. They were treated upon the same footing by this court in its opinion in the *Girard Trust Company* case. It is believed, however, that the contention of the Government that a credit is allowed when the Commissioner first signs the Schedule of Overassessments is in conflict with this reasoning.

When the *Girard Trust Company* case was before this court, it would have been entirely possible for the court to have adopted the view that, since the taxpayer's account had a definite, fixed status (although unknown to the Commissioner) at the time the Commissioner signed the Schedule of Overassessments, and the law specifically required the amount of overpayment, if any, to be immediately refunded to the taxpayer, no discretion being left with the Commissioner in this regard, so that the refund necessarily followed the allowance of the overassessment, the date of allowance of the overassessment was the date of allowance of the refund. The court, however, did not take that view. On the contrary, it decided that the allowance of the overassessment did not constitute an allowance of the refund, and that the refund was not allowed within the meaning of the statute until it had also been decided by the Commissioner that a *refund* should be granted and the exact amount of the refund fixed finally by him.

The interpretation which the Government urges for the word "allowance" as applied to credits is plainly in conflict with its construction by this court in the above case.

2. The allowance took place on July 31, 1924, when the Commissioner approved the Schedule of Refunds and Credits.

The principal reason advanced by the Government in support of its contention that the allowance does not take place at that time is that the authorization to the Disbursing Clerk which the Commissioner signs relates only to refunds and interest upon refunds and credits, and makes no reference to credits, as such.

It is submitted that the above reasoning takes too literal a view of the matter. The important thing is the *approval* by the Commissioner. As was stated by this court in the *Girard Trust Company* case, the schedule upon its return from the Collector "is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval." That such approval was given necessarily follows from the entire course of procedure in this case—even though the authorization to the Disbursing Clerk expressly referred only to refunds. The Collector's action in entering the credit upon his books was tentative only and subject to the subsequent approval of the Commissioner. It is plain that the entries made by the Collector in his books do not constitute a final allowance. He is required to report back to the Commissioner, after he has ascertained the facts concerning the taxpayer's account, whether there has been an overpayment, the amount of overpayment, amount of credit, and the due dates of the items against which credits were made (R.

6). It cannot be assumed that this is an empty formality. The only reasonable interpretation of this procedure is that such report is required for the purpose of enabling the Commissioner to determine the correctness of the Collector's findings before giving his final approval. For example, the propriety of crediting an overpayment of taxes for one year against an unpaid assessment for another year depends upon whether the unpaid assessment is legally collectible, in whole or in part. The determination of that question can only be made by the Commissioner, and, being judicial in character, cannot be delegated to the Collector.

The matter is well summed up by the Court of Claims in *Pottstown Iron Co.* v. *United States*, 40 Fed. (2d) 142, by the following statement in its opinion:

> "In these cases involving interest upon credits, the defendant argues that when the commissioner signs the schedule of refunds and credits he only authorizes the disbursing clerk to pay the amount of tax shown to be refundable and the interest upon any refund or credit, and that this can not be regarded as the taking of a credit. We think by this action the commissioner does more than merely authorize the payment of the refund and the interest. He approves the report of the collector, finally determines that there has been an overpayment, and makes effective a credit of that overpayment against the additional tax for another year."

In addition to the decision in the instant case, the following cases have held that a credit is allowed when the Commissioner finally approves the Schedule of Re-

funds and Credits as reported by the Collector, and not when the Commissioner first signs the Schedule of Overassessments for transmission to the Collector.

Swift & Co. v. *United States*, 68 Ct. Cls. 97.
Atlas Powder Co. v. *United States*, 40 Fed. (2d) 136.
West Leechburg Steel Co. v. *United States*, 40 Fed. (2d) 131.
Pottstown Iron Co. v. *United States*, 40 Fed. (2d) 142.
Revolution Cotton Mills v. *United States*, 41 Fed. (2d) 898.
Andrews Steel Co. v. *United States*, Ct. Cls. June 2, 1930.
Kingan & Co., Inc., v. *United States*, Ct. Cls. Oct. 20, 1930.

The only case to the contrary is *Penn Smokeless Coal Co.* v. *United States*, 34 Fed. (2d) 205, which must be considered of very questionable value, inasmuch as the decision was based upon an unfortunate error by that court in mistaking, for a rule laid down by this court in the *Girard Trust Company* case, the treasury regulation which was quoted in the opinion in the *Girard* case only for the purpose of holding the same invalid.

(a) The rule adopted by the court below creates no administrative difficulties.

The court in the *Girard Trust Company* case, after laying down the rule that "The statute is to be construed in the light of the difficulties of Government bookkeeping and accounting," proceeded to state:

> "This date* would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner."

No reason has been advanced which would tend to show that the adoption of this date for fixing the time for the allowance of credits, as well as refunds, would create any inconvenience in the computation of interest adjustments, or otherwise.

Indeed, as above pointed out, it would avoid the difficulty presented under the rule contended for by the Government, as to the application of overpayments against taxes or instalments falling due between the date when the Commissioner first signs the Schedule of Overassessments and the Collector's action thereon.

It by no means follows, as argued by the Government, that the allowance of a credit must precede the allowance of a refund. On the contrary, it is much more logical to hold that both are allowed at one and the same time, since, as stated by the Circuit Court of Appeals (R. 22), the amount to be refunded is absolutely determined when the credit is allowed.

(b) Contrary departmental interpretation should not control the plain meaning of the law.

Upon this point the instant case stands exactly the same as the *Girard Trust Company* case. In that case the regulation held invalid had been originally adopted by the Treasury department under the Revenue Act of 1921, and the interest provisions of that statute had been uniformly construed in accordance therewith by the administrative department entrusted with its en-

*Date when Commissioner signed the Schedule of Refunds and Credits returned by Collector.

forcement. The material language of that statute was later re-enacted in the Revenue Act of 1924. Yet the court in the above case had no hesitation in declaring to be invalid as contrary to law this regulation which had been in force for nearly five years at the time of its decision, *i.e.*, March 1, 1926. There is no reason why any greater weight should be given to the regulation in the present case.

Reference is made in the Government's brief (pp. 28, 29) to section 1116 of the Revenue Act of 1926. That statute was repealed by section 614 of the Revenue Act of 1928, and, even while in force, had no application to the instant case. In the 1926 law Congress was primarily concerned with the dates from which and to which interest should be computed upon overpayments refunded or credited.* The definition contained in sec-

*The following is taken from the Conference Report on the Revenue Bill of 1926, said report being dated February 22, 1926, and found in Report No. 356, House of Representatives, 69th Congress, First Session, at page 56:

> "Amendments Nos. 181 and 182: The House Bill reenacted without change the existing law relating to payment of interest on refunds and credits. Under existing law in the case of a credit taken against an additional assessment the taxpayer is allowed interest from the date of his overpayment to the date of the additional assessment. In the case of taxes imposed by acts prior to the act of 1921 the taxpayer (except as provided in section 283 of this bill) pays no interest in the case of underpayment up to the date of assessment. Consequently it frequently happened that the taxpayer who owes the Government money upon which he is paying no interest is collecting interest upon money which the Government owes him. This amendment remedies this situation by allowing interest in the case of a credit under an act

tion 116 as to the date of allowance was limited to refunds for the reason that this date was not material in computing the period for the payment of interest upon credits. As to credits such period was definitely fixed as from the date of overpayment to the due date of the amount against which the credit was taken, or, in the case of an additional assessment for 1921 or later years, to the date of such assessment, irrespective of the date of allowance. It is believed that no proper inference can be drawn from this section to support the Government's position in this case. On the contrary, the Conference Report shows the understanding of Congress to be as follows:

> "In practice the Commissioner *first* signs the schedule of overassessments, which is sent to the collector, *in order to determine whether the overpayments should be credited or refunded.*" (Italics supplied.)

The attention of the court is directed to the fact that the taxes against which the credits in this case were finally applied were not additional assessments, but were original assessments (R. 5). This is not one of the class of cases described in the Conference Report

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prior to the Revenue Act of 1921 only to the date on which the original tax against which the credit is taken was due. In the case of refunds interest is allowed 'to the date of the allowance of the refund.' In practice the Commissioner first signs the schedule of overassessments, which is sent to the collector, in order to determine whether the overpayments should be credited or refunded. This amendment proposes to fix as the date upon which the refund is allowed the date on which the commissioner signs the schedule of overassessment."

where a taxpayer who owes the Government money upon which he is paying no interest is collecting interest upon money which the Government owes him. All that respondent is awarded by the judgment of the court below is compensatory interest upon the amount of overpayment from the date of such overpayment to the due date of the instalments against which the credits were applied, as provided in the Revenue Act of 1924, and it is clear that the decision of the court below (to borrow the words of this Court in the *Girard Trust Company* case) *is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government.*

3. Significance of July 11, 1924, the date on which the Collector acted upon the Schedules.

It will be noted that the date when the Collector acted upon the schedules, namely, July 11, 1924, as well as the date when the Commissioner finally approved the same, namely, July 31, 1924, occurred after the effective date of the Revenue Act of 1924, *i.e.*, June 2, 1924 (R. 5). For this reason it was unnecessary for the trial court to decide upon which of these dates the allowance took place, since in either event the amount of interest payable would be governed by the provisions of the 1924 Act (R. 16).

In the *Girard Trust Company* case the court held that the Commissioner was the final judge in the administrative branch of the Government to decide that a refund or credit should be granted, and it may follow that the date of action by the Collector is without any particular significance. However that may be, it is obvious that

this was the first date on which a determination was made that a *credit* should be granted.

It is believed, as pointed out, that the true date of allowance is the date when the Commissioner finally approves the Schedule of Refunds and Credits returned by the Collector, but, if it should be held that the time of the Collector's action upon the schedules is the determinative date, the respondent is likewise entitled to its judgment.

CONCLUSION.

It is respectfully submitted that the decision of the court below was correct, and that its judgment should be affirmed.

Respectfully submitted,

CHARLES W. MULCAHY,
Attorney for Respondent.

ROBERT N. MILLER,
Of Counsel.

November, 1930.